

*a***YUSAINI MAT ADAM****v.****PP***b*

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[BIL: 42-27-1997]
29 JULY 1999

c

EVIDENCE: *Witness - Child witness - Test applicable - Evidence Act 1950, s. 133A*

EVIDENCE: *Corroboration - Child witness - Evidence Act 1950, s. 133A*

CRIMINAL PROCEDURE: *Conviction - Grounds for reversing a conviction*

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CRIMINAL PROCEDURE: *Prosecution - Witnesses - Child witness - Procedure to be followed*

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The appellant was convicted in the Sessions Court of committing rape on his ten-year-old step-daughter. The child was aged slightly over 11 years on 14 October 1996 when she testified that the appellant had raped her on the morning of 25 May 1996. During cross-examination, she said that she had discussed the matter with her aunt and that what she said in court was what her aunt had instructed her to say. She also said that her aunt and the appellant had had an argument. The next day, she changed her story and said that she had not understood the question, and that her aunt and uncle had not instructed her in what to say.

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The sessions judge made several observations about the child's demeanour in court, including that she sometimes cried while relating what had happened and refused to speak in court unless the husband of her aunt was present.

*g***Held:***h*

[1] The child who was 11 years old was certainly of 'tender years' and ought to have been examined as to whether she had sufficient appreciation of the solemnity of the occasion and the added responsibility of telling the truth. Only after the judge had satisfied herself on that, should the child have proceeded to take an oath or make an affirmation to tell the truth.

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[2] Otherwise, the child's evidence should have been taken and reduced in writing under s. 133A of the Evidence Act 1950 ('the Act').

[3] On the failure of the sessions judge to hold such an enquiry and follow the procedure in s. 133A of the Act, the conviction should be set aside. a

[Appeal allowed.]

Case(s) referred to:

Muharam Anson v. PP [1981] 1 MLJ 222 (*refd*) b

R v. Hayes [1977] 64 Cr App R 194 (*refd*)

Tham Kai Yau & Ors v. PP [1977] 1 MLJ 174 (*refd*)

Legislation referred to:

Evidence Act 1950, s. 133A

Oaths and Affirmation Act 1949, ss. 8, 14 c

Children & Young Persons Act 1933 [UK], s. 38

Criminal Justice Act 1988 [UK], s. 33A

Criminal Justice and Public Order Act 1994 [UK], Sch 9

Other source(s) referred to:

Criminal Evidence, Andrews & Hirst, 1997, 3rd edn d

For the appellant - Gurbachan Singh; M/s Bachan & Kartar (Radzuan Ibrahim with him)

For the DPP - Stanley Clement Augustin

Reported by Anne Khoo e

JUDGMENT

KC Vohrah J:

The Sessions Court convicted the appellant for the offence of rape committed on his stepdaughter, a girl aged 10 years 8 months. The rape was allegedly committed in the family flat at Cheras, Kuala Lumpur. f

The evidence of the girl was that on the morning of 25 May 1996 her family including the accused left the 15th floor flat to go to the ground floor. Then the accused came back and sent the girl's elder brother down with his car key. As the girl was about to leave the flat the accused prevented her from doing so and then he raped her. g

She gave her evidence in court on 14 October 1996. She was then just slightly over 11 years of age. When a child of tender years is called to be a witness the procedure is for the court to hold an inquiry to form an opinion if the child is in the position to be sworn (see eg, the Federal Court case of *Muharam bin Anson v. PP* [1981] 1 MLJ 222 at 223). However, the Sessions Court judge did not hold such an inquiry before she allowed the child to give her evidence. h

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- a* Unfortunately in this case neither the learned judge of the Sessions Court nor the DPP nor the counsel who acted for the appellant in the court below appeared to have been aware of s. 133A of the Evidence Act 1950 which reads:
- b* 133A. Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise
- c* taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code of the Federated Malay States shall be deemed to be a deposition within the meaning of that section:
- Provided that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of
- d* the offence unless that evidence is corroborated by some other material in evidence in support thereof implicating him.
- Section 133A which was introduced in the Evidence Act 1950 in 1971 (see PU(A)261/71) is the equivalent of s. 38 of the English Children & Young Persons Act 1933 (repealed since 1991).
- e* In England, prior to 1933, children could testify in criminal proceedings only if they were found competent to swear the same oath as adult witnesses. Section 38 of the English Act first introduced the principle of unsworn evidence in criminal cases.
- f* In *R v. Hayes* [1977] 64 Cr. App. R 194, Hayes was charged with inciting three boys to commit acts of gross indecency with him, and also with committing an act of gross indecency with one of them. The boys were called as witnesses and the two older boys, aged 11 and 12, were sworn after being examined by the judge. The judge's questions during his examination were to
- g* a large extent concerned with the boys' religious understanding, but it was clear that the oldest boy, in particular, had little if any religious belief. The appellant claimed that the boy should not have been sworn in those circumstances, but the Court of Appeal upheld the trial judge's decision. Bridge LJ said at 196:
- h* It is unrealistic not to recognise that, in the present state of society, amongst the adult population the divine sanction of an oath is probably not generally recognised. *The important consideration we think, when a judge has to decide whether a child should properly be sworn, is whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to*
- i* *tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal, social conduct.* (emphasis added)

As was observed by Andrews & Hirst in *Criminal Evidence*, 3rd edn (1997):

The competence of a child could never be presumed. Even for the purpose of giving unsworn testimony, it was still necessary to establish by positive means that the child understood the ordinary duty of telling the truth. It was the duty of a court or judge to determine competence and the proper level of competence before proceeding to admit evidence from a child. This could involve the child being asked questions by the trial judge, and it could also involve the calling of expert opinion evidence from child psychologists. If a child was allowed to testify without such prior examination, any conviction based on that child's evidence was liable to be quashed on the ground of material irregularity (*R v. Khan* [1981] 73 Cr. App. R 190).

If the Sessions Judge had, after an inquiry, decided that "the child had a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking the oath, over and above the duty to tell the truth which is an ordinary duty of normal, social conduct" the judge would have been on guard when assessing the evidence of the child.

It is disquieting to observe that the child might have rehearsed the evidence she was to give in court or coached to give the sworn evidence by her mother's sister, SP2. During cross-examination the child witness said:

Saya ada bincang dengan mak cik tentang perkara ini. Saya setuju apa saya cakap di mahkamah inilah mak cik yang suruh ... mak cik yang suruh saya buat. Mak cik dan bapa tiri ada bergaduh ...

The next day, during examination-in-chief, she changed the story:

Semalam saya tak faham soalan. Tak betul mak chik dan pak chik suruh cakap begini di mahkamah.

Then there was this observation by the Sessions Court judge that the girl sometimes cried when she was to relate what had happened, sometimes she turned pale and sometimes she refused to speak and that the court had to adjourn the proceedings several times in order for her to clear her mind before she testified. The judge also observed that she appeared to be afraid of the Deputy Public Prosecutor, the counsel for the defence and the accused. She remarked, too, that at times when the child was called in to be identified by witnesses who were testifying she refused to enter the court and instead stood by the doorway of the court and quickly moved away. Another observation by the judge was that she refused to speak in court unless the husband of her aunt was present and that at the beginning the court allowed him to be in as the court thought he was not involved as a witness.

- a* I have set out one aspect of the contradictory evidence of the child and the observation of the Sessions Court judge on the girl to show the girl who was 11 years old when she appeared in court to give evidence was certainly of “tender years” and ought to have been examined as to whether she had sufficient appreciation of the solemnity of the occasion and the added responsibility of telling the truth over the ordinary duty to tell the truth upon pain of punishment for perjury under s. 14 of the Oaths and Affirmation Act 1949. Only after the Sessions Court Judge had satisfied herself on the above should the child then have proceeded to take an oath or make an affirmation to tell the truth under the Oaths and Affirmation Act 1949. (see eg, the procedure adopted by the trial judge in *Tham Kai Yau & Ors v. PP* [1977] 1 MLJ 174 at 175, left column, C). Otherwise the child’s evidence should have been taken and reduced in writing following the procedure under 133A of the Evidence Act 1950. Even then under s. 8 of the Oaths and Affirmation Act any person “who by reason of immature age ought not in the opinion of the court to be admitted to give evidence or oath or affirmation shall be admitted to give evidence after being cautioned by the court to speak the truth, the whole truth and nothing but the truth.”

On the failure of the Sessions Court judge to follow the procedure in s. 133A of the Evidence Act 1950, the conviction should be set aside.

- e* Before the court rises there is this observation to make.

- Section 38 of the English Children and Young Persons Act 1933 has been repealed and replaced by some other law and perhaps it is time to study why it was repealed and whether we should do the same to our s. 133A of the Evidence Act 1950 bearing in mind, too, the experience of other Commonwealth countries on the matter of children’s evidence in court and also that in our judicial system jury trials have been abolished. In addition, rules relating to corroboration need a re-look and the necessity for the examination procedures of child witnesses to be child-friendly need to be taken into account.

- g* As was remarked by Andrews and Hirst in *Criminal Evidence* at 256:

- h* It is increasingly become a cause for concern, in cases involving sexual and/or violent crimes against children, that too many prosecutions were failing, even in cases of fairly clear guilt. There were at least four identifiable reasons for this. In some cases, the competence rules disqualified the children concerned from Giving evidence at all, namely where they failed to pass courtroom “examinations” requiring proven understanding of the concept of truthfulness. If the test was passed, the child’s ordeal as a witness was still made far more difficult than it should have been. Children were usually propelled unprepared and unprotected into the intimidating atmosphere of a formal criminal trial,
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where they often failed to come up to proof. In many cases their evidence had to be corroborated by other evidence before convictions could be based upon it, or was subjected to a corroboration warning, under which the jury would be told that it would be dangerous for them to rely on that evidence alone. Finally, the similar fact rule as construed in cases such as *R v. Inder* [1977] of Cr. App. R 143, worked against the victims of serial child sex abuse, preventing the various victims of such offenders from corroborating each other's stories in all but the most strikingly similar of cases.

In response to these concerns, changes were progressively made to the rules governing corroboration requirements, which have now largely disappeared, and to the processes of examination and cross-examination at trial, which are now far more child-friendly. The common law rules governing the admissibility of similar fact evidence have also been relaxed ...

It might be necessary to look at the Pigot Committee Report of 1989 and the legislation following that, the ensuing case law and the present s. 33A of the English Criminal Justice Act 1988 as amended by Schedule 9 to the Criminal Justice and Public Order Act 1994.

The appeal is allowed. Conviction and sentence are set aside.

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